In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-510

RICHARD THORNE, a/k/a OM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends: (1) A plain view seizure subsequent to a lawful search was invalid; (2) his failure completely to execute a waiver form rendered his in-custody statements inadmissible; and (3) allegedly improper comment by the prosecutor deprived him of a fair trial.

Petitioner was convicted, after trial by jury in the United States District Court for the Southern District of New York, on two counts of possession of counterfeit plates, negatives, and $114,000 in counterfeit currency, in violation of 18 U.S.C. 472 and 474. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed without

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opinion on September 30, 1974 (Pet. App.). The petition for a writ of certiorari was not filed until October 31, 1974, and is therefore untimely under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion to grant the writ.

The evidence at trial established that petitioner was the leader of a group entitled "Om Lovers" (consisting of petitioner, who was known as "Om", six women, and three children). A sixth floor loft at 146 West 25th St. in New York City was leased by "Om Lover" Sarah Young, but access to the premises was controlled by petitioner, who also arranged for rental payments. The building superintendant, Clarence Jefferson, testified that he saw petitioner in the building almost daily and believed that he and the others lived there, although Jefferson never saw them sleeping in the loft (Tr. 31, 44, 46, 115, 126).[1]

On July 26, 1973, Secret Service Agent Guy Caputo received counterfeit currency from Mrs. D. Michaux, who worked on the fifth floor of the 25th Street building and had found the currency in the fifth floor ladies' room. After investigation, Agent Caputo found about $7,000 in counterfeit currency in the air shaft vents on all floors below the sixth (Tr. 166, 167, 192, 199, 200, 202–207).

Agent Caputo obtained a search warrant for the sixth floor loft and executed it at about 6:30 p.m. on July 26th (Tr. 195–196). Among the items seized at that time were two counterfeit $10 bills, burnt counterfeit notes, sample printing papers, printing ink, two

[1] "Tr." denotes the transcript of the jury trial.

printing presses, and instruction books on how to use the presses (Tr. 302, 311, 236–237). All of these items were of the type used to print currency. With the exception of the printing presses, which weighed three tons, they were removed on the day of the search and an inventory return filed (App., *infra*, pp. 10–11).[2]

One agent remained in the loft overnight. On the 27th the locks were changed. One key was kept by the Secret Service and one given to the landlord. Thereafter, the agents did not return to the loft until August 1st and then solely to determine how to expedite the moving of the presses. While examining a makeshift wall to determine if the presses could be removed without tearing down the wall, they discovered printed currency in plain view in the interstice of the partition. Since there were other items in plain view in the crevice, which they could not reach, the agents dismantled the smaller side of the wall, uncovering more than $100,000 in counterfeit currency, both cut and uncut, along with 64 printing negatives and 57 printing plates used in the manufacture of counterfeit currency (Tr. 242–247; App., *infra*, pp. 11–12). Petitioner's fingerprints were found on two of these printing plates (Tr. 429).

1. Petitioner's first two contentions, that the district court improperly denied his motion to suppress the counterfeit currency found in the loft on August 1st and to suppress his statements to Secret Service Agents shortly after his arrest, were thoroughly con-

[2] The appendix to this memorandum contains the "Memorandum and Order" of the district court denying petitioner's suppression motions.

sidered and properly rejected in the Memorandum and Order of the district court, upon which we rely. We add only the following:

(a) Search and seizure: Petitioner makes no complaint regarding the execution of a lawful search warrant at 146 West 25th Street on July 26, 1973. Rather he contends that the inadvertent discovery of counterfeit currency and plates in the makeshift partition on August 1, 1973, constituted an illegal warrantless search.

Petitioner's contention is founded on the erroneous assumption the August 1st visit was a second search for which a separate warrant was required. The August 1st visit to the loft, although it resulted in a plain view seizure, was not a search (App., *infra*, p. 12). As the district court correctly pointed out, the Secret Service was in constructive possession of the premises on August 1st (*id.* at 10), since "officers must necessarily retain some control over the premises in which the articles are located for whatever reasonable time is required for removal of articles seized" (*id.* at 13). See *United States* v. *American Brewing Co.*, 296 Fed. 772, 777 (E.D. Pa.), and *Levin* v. *Blair*, 17 F. 2d 151, 152 (E.D. Pa.). Here, the agents retained control of the premises for only five days, which was a reasonable time in view of their responsibility for the removal of printing presses weighing approximately 6,000 pounds.

Since the agents were properly in the loft on August 1st, the inadvertent plain view discovery of the exposed currency was lawful (App., *infra*, p. 15).

See, *e.g.*, *Harris* v. *United States*, 390 U.S. 234; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 446, 469. Tearing down part of the partition and seizure of additional incriminating evidence was also proper. The agents removed the plywood sheets from the partition only after they were unable to reach the exposed currency by extending their hands down into the wall (T. 2/8/74, pp. 19–21).[3]

(*b*) Petitioner's statements: The district court found that petitioner was fully advised of his constitutional rights at least three times after his arrest and that he knowingly and voluntarily waived those rights (App., *infra*, p. 9). Petitioner argues, however, that his partial execution of the waiver form demonstrated his intention not to make any statements to the authorities (Pet. 16).[4]

Petitioner cites no legal authority for this proposition and it is manifestly unsound. A written waiver is not required under *Miranda* v. *Arizona*, 384 U.S. 436, 444. Moreover, petitioner stated that he understood his rights and at no time indicated that he was unwilling to answer questions or that he wanted an attorney (App., *infra*, p. 8; T. 2/8/74, p. 30). Judging the totality of circumstances surrounding petitioner's in-custody statements, the district court correctly found that petitioner waived his rights. See *United States* v. *McNeil*, 433 F. 2d 1109, 1113 (C.A.D.C.); *United States*

[3] "T." denotes the transcript of the suppression hearing.

[4] Petitioner signed the "Warning of Rights" portion of Secret Service Form 1737, but did not execute the "Waiver" portion on the bottom half of the form (Gov't Exh. 10).

v. *Cassino*, 467 F. 2d 610, 620 n. 30 (C.A. 2), certiorari denied, 410 U.S. 928; *United States* v. *Speaks*, 453 F. 2d 966 (C.A. 1), certiorari denied, 405 U.S. 1071; *United States* v. *Crisp*, 435 F. 2d 354 (C.A. 7), certiorari denied, 402 U.S. 947; *Klinger* v. *United States*, 409 F. 2d 299 (C.A. 8), certiorari denied, 396 U.S. 859.

2. Petitioner advances for the first time in his petition a claim that he was prejudiced by the prosecution's opening statement to the jury concerning petitioner's position as leader of the "Om Lovers" (Tr. 2–5; Pet. 18). Since this contention was not raised in the courts below, it should not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. In any event, the remarks were proper as a summary of what the government intended to prove concerning the relationship among the parties who occupied the loft where the counterfeit currency and paraphernalia were seized. See *Butler* v. *United States*, 191 F. 2d 433, 435 (C.A. 4). In this context the comments were not prejudicial, especially in light of petitioner's opening statement about himself as "Om" (Tr. 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX

United States District Court Southern District of New York

(73 Cr. 976–CLB; 73–3407)

UNITED STATES OF AMERICA

v.

NANCY LEE NAYLOR, DEFENDANT

(73 Cr. 983–CLB; 73–3414)

UNITED STATES OF AMERICA

v.

OM (INDICTED AS RICHARD THORNE), DEFENDANT

MEMORANDUM AND ORDER

BRIEANT, J. Defendant Om has been charged in a two-count indictment with possession of counterfeit United States obligations and articles used for counterfeiting, in violation of 18 U.S.C. §§ 472 and 474. Defendant Naylor has been charged in a one-count indictment with possession of articles used for counterfeiting, in violation of 18 U.S.C. § 474.

By notice dated January 22, 1974, defendant Naylor moved, pursuant to Rule 41(f), F.R. Crim. P., for an order suppressing evidence, consisting of counterfeit currency, plates and plate makers seized by Secret Service agents on August 1, 1973. By notice dated January 28, 1974, defendant Om joined in defendant Naylor's motion to suppress and also moved to suppress

statements he made at the time of his arrest on October 6, 1973. A hearing was commenced on February 4, 1974, continued on February 8th and completed on February 13th.

Dealing first with the statements sought to be suppressed by defendant Om, these statements, as noted above, were made on October 6, 1973. After his arrest, defendant was taken to the United States Secret Service office at 90 Church Street, New York City. Upon his arrival, he was asked by Agent Ott if he had been warned of his rights, and defendant replied that he had been (Tr. p. 41). Nevertheless, since Om seemed inclined to talk, Agent Ott repeated the *Miranda* warnings because Om "began talking about counterfeiting" (Tr. p. 36). Agent Ott next presented Om with Secret Service Form 1937, entitled "Warning and Consent to Speak," containing *inter alia,* the requisite *Miranda* warnings, which defendant read, stated he understood, and signed (Tr. p. 37). Defendant did not indicate that he wanted a lawyer, nor that he was unwilling to answer questions (Tr. p. 40).

After routine processing procedures (fingerprinting, photographing and taking a personal history), Agent Ott brought the defendant to the arresting officer and agent in charge, Agent Sheafe. In Agent Ott's presence, Agent Sheafe also gave defendant *Miranda* warnings.

Despite the fact that defendant was apprised of his rights at least three times, defendant contends that his statements were not voluntarily given because he did not sign the second part of Secret Service Form 1937, which is entitled "Waiver" and reads as follows:

> I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against

> me. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer questions.

Agent Ott's signature appears on the signature line below this statement, was crossed out, and the Agent signed the certification at the bottom of the form which states that the Agent read the document to the defendant, who also read it, and signed it. Agent Ott testified, and I find, that he signed on the wrong line (at the place intended for Om), inadvertently and immediately corrected his error (Tr. p. 38). Agent Ott testified, and I find, that as a "general rule," the waiver as well as the warning portions of the form are signed, but he does not "instruct" defendants to sign either. In this instance, the Agent did not "instruct" Om to sign anything, nor did defendant expressly decline to sign the waiver (Tr. pp. 42–44).

The Court finds no constitutional or evidentiary significance in the sequence of events concerning Secret Service Form 1937. It is not crucial to the issue of the voluntariness of defendant's statements that he did not sign the waiver portion of the form. A finding of waiver is based on defendant's conduct in light of all the surrounding facts and circumstances.

The Court finds that defendant was advised of his constitutional rights at least three times, and acknowledged verbally, and in writing, that he was so advised, that he understood his rights and waived his rights to have counsel present, and remain silent, and consented, voluntarily and knowingly, to make a statement. I find beyond a reasonable doubt, that the statements or admissions sought to be suppressed were voluntarily made after defendant had been fully advised of his constitutional rights, and after a knowledgable waiver as aforesaid.

Turning to the motion to suppress in which both defendants have joined, we note first that a search warrant was issued by Magistrate Hartenstine of this Court on July 26, 1973, authorizing search of a loft at 146 West 25th Street, New York City. A return was made and filed on July 27, 1973, and an inventory of items seized was filed. The motion to suppress is not directed to the inventory of items seized which was filed on July 27th. The items sought to be suppressed were seized on August 1, 1973, and are listed in an undated "supplementary inventory."

Two of the items listed in the July 27th inventory as having been seized were printing presses. The larger of the two presses was described correctly by Agent Caputo as being, "about six and one-half to seven feet tall, about five feet long and about four feet wide. The smaller press was about five to five and a half feet high, about three and a half to four feet long and about three feet wide." The presses together weighed about three tons. From July 26th at least through August 10th, when the presses were removed by a private licensed rigger employed by the Government, apparently no one was occupying the premises.

Because of the size of the printing machines, the agents were unable to take them out of the loft physically on July 26th. Accordingly, to protect the evidence, two Secret Service agents remained on the premises until the next day. The lock was then changed. One key was given to the landlord and the other retained by the Secret Service (Tr. p. 12), so that in effect the premises remained padlocked and in the actual or constructive possession of the Government, at least until August 10th.

Agent Sheafe attempted as expeditiously as possible to have Santini Brothers, a reputable local moving company, employed regularly by the Government for

such work, take the presses out of the loft, but that company was unable to do so until about August 10th.

Pursuant to his conversation with the Santini firm, and in order to expedite its work, Agent Sheafe and two other agents went to the loft on August 1st. The purpose of their visit was to study and consider the feasibility and best way of moving the presses. This action on their part was particularly necessary with respect to the larger press, which was located behind a recently constructed wall and would not fit through the doorways which led through the wall to the elevator which served the loft.

The wall consisted of plywood sheets from floor to ceiling on one side, nailed to 2" x 4" studs, and plywood sheets from the floor to a height of four feet on the other side. This left verticle interstices between the studs, and between the sheets, at a height of four feet, and below eye level.

While Agent Caputo was inspecting the wall to see if a part of it could be cut out to facilitate removal of the press, without damaging the building, he saw a roll of paper imprinted in green sticking out of one of the interstices. Although he could not then tell merely from this observation, that this was counterfeit currency, we think he was justified in inspecting the roll of paper.

Counterfeit money had already been discovered on the premises in great quantity, and it would be reasonable to infer that such a roll of paper, partially hidden or secreted inside the wall also might be counterfeit money. The roll of paper was in fact counterfeit United States currency, not yet cut up in bill size (Tr. p. 16). It measured about 18 or 24 inches in length, or so appeared to the Court at the hearing.

Apparently cement had been poured into the space between the plywood sheets and water had been poured

in on top of the cement. Some of the cement had solidified, some appeared wet, and some had remained in powder form. This was an indication, readily visible, that attempt might have been made to cement contraband into the wall. After lifting out the first roll of counterfeit currency, the agents removed the plywood and the cement. This disclosed additional counterfeiting paraphernalia and additional counterfeit currency in substantial quantity, which defendants are seeking to suppress.

Agent Caputo testified, and I find, that he had not looked at the wall on July 26th, while executing the search warrant, and his purpose in inspecting it on August 1st was related solely to determining how best to remove the presses constructively seized on July 26th, when he padlocked the loft. The initial roll of paper Caputo observed was not visible from any other place in the room but was clearly visible when he looked down into the wall for the aforementioned purpose (Tr. p. 20).

The agents decided either the press or the wall would have to be dismantled to remove the larger press.

Defendants argue that by August 1st, the search warrant issued on July 26th had become "functus officio," and after having filed the return on July 27th, the officers had no authority to conduct a "second search." *Cf. Cady* v. *Dombrowski,* 413 U.S. 433 (1973).

I find there was no "search" on August 1st, but only a "seizure", and therefore we need not discuss the question of when the authority granted by the July 26th search warrant expired.

"That which is in plain view is not the product of a search." *U.S.* v. *Barone,* 330 F. 2d 543, 544 (2d Cir. 1974). See also *U.S.* v. *Miller,* 356 F. 2d 63, 69 (5th Cir. 1966), and cases cited therein. Once it is estab-

lished that law enforcement officials were lawfully within view of the evidence, the question becomes one of whether the seizure was lawful.

The question presented falls squarely within the "plain view" doctrine. See *Harris* v. *United States,* 390 U.S. 234 (1968); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

Two separate evils are prohibited by the Fourth Amendment: unreasonable searches and unreasonable seizures. The first inquiry, then, is whether the Secret Service agents were reasonably and lawfully in the loft on August 1st, or were engaged in unlawful conduct. Their initial intrusion into a constitutionally protected area (part of the loft was a residence of one Chong, also indicted for counterfeiting) was made under a lawful search warrant. The invasion of privacy thus authorized was not increased by the fact that the agents returned to the loft to consider and decide how to remove two large unwieldly printing presses, already constructively seized under a properly issued and executed search warrant, by the act of changing the lock.

Modern cases assume without citation of authority that in order to execute a search warrant, the officers must necessarily retain some control over the premises in which the articles are located for whatever reasonable time is required for removal of articles seized. Numerous cases affecting seizure of bulky or weighty articles arising out of violations of the National Prohibition Act are clear on the point that the courts will not intervene unless law enforcement authorities act unreasonably. An illegal vat, still or whiskey rectifier surely could not be dismantled and hauled away with any more dispatch than could two large printing presses. In *United States* v. *American Brewing Co.,*

296 F. 772 (E.D. Pa. 1924) the district court held that the prohibition officers "had no right to remain in the defendant's premises longer than was reasonably necessary to make a search and remove such personal property as they were authorized to seize." 296 F. at p. 777. See also *Levin* v. *Blair*, 17 F. 2d 151 (E.D. Pa. 1927), in which the Court stated at p. 152:

> "The prohibition authorities had made use of this search warrant as an authority to seize and hold possession of the real estate premises. [*T*]*he officers have no right* * * * *to remain on the premises for a longer time than is necessary to execute the writ.*" [Italics ours.]

These illustrative cases show the converse, that a right exists to remain in the search premises for a sufficient time to execute the writ and effect the seizure. Here, on August 1st, that period of time necessary to effect the seizure of the presses, and their removal had not expired. Accordingly, the presence of the agents on that date in the loft was lawful.

As the Supreme Court stated in *Coolidge, supra,* at p. 466:

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence * * *. What the plain view cases have in common is that the police officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

The Secret Service agents here had a prior justification for being in the loft, in furtherance of their duty to remove the presses, and therefore were not conducting an unlawful search.

Their discovery of the evidence was fortuitous, and not the result of an unauthorized exploratory search.

See *Coolidge, supra,* at p. 469. There is no evidence in the record to contradict the testimony of Agents Sheafe and Caputo that their only purpose in inspecting the wall, and looking at the space between the plywood sheets was to determine the best way to remove the printing presses. The agents' conduct demonstrates that they recognized and accepted the limited authority they had to seize the contraband. They did not conduct a search of the entire premises on August 1st, but limited their activities to the wall where the counterfeit roll had been exposed to view.

Having extricated the first, visible, roll of counterfeit currency from the wall, the agents were not required to halt their investigation to obtain a further search warrant. While the facts are somewhat dissimilar, we believe *United States* v. *Green,* 474 F. 2d 1385 (5th Cir. 1973) supports this finding. There a fire marshal investigating the cause of a fire uncovered what he recognized as a counterfeiting plate. When he removed this plate, he uncovered others, which defendant sought to have suppressed on the ground that the marshal should first have obtained a search warrant. The Court held (p. 1389):

> [T]he Fourth Amendment does not require that [the fire marshal] have halted his investigation once the first counterfeiting plate was uncovered and have obtained a search warrant before continuing. The activity that led to the discovery of the plates was within the scope of the justification for [the marshal's] intrusion.

To require a second warrant to seize contraband which inadvertently came within the plain view of the agents performing duties they were authorized to perform would be just as

> * * * senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found. *Terry* v. *Ohio,* 1968, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 889; *Harris* v. *United States,* 1968, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 1067.
> 474 F. 2d at 1390.

The motions are in all respects denied.

So ordered.

Dated: New York, New York; March 21, 1974.

Charles L. Brieant, Jr.

CHARLES L. BRIEANT, Jr.,

U.S.D.J.